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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

WILLIAM A. EGAN, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. EGAN, JR.,
Petitioner Pro Se
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July 5, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

WILLIAM A. EGAN, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William A. Egan, Jr., hereby petitions for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit affirming a judgment of conviction in the United States District Court for the Southern District of New York on four counts of failure to file income tax returns under 26 U.S.C. §7203.

Opinion Below

The *per curiam* opinion below is not reported. It is appended hereto as Appendix A.

Jurisdiction

The judgment sought to be reviewed was made and entered on April 20, 1972. An order denying a timely motion for rehearing was made and entered on June 5, 1972. The statutory provision believed to confer on this court jurisdiction to review the judgment in question is 28 U.S.C. Section 1254(1).

Questions Presented for Review

1. Whether the federal government may, consistent with the privilege against self-incrimination clause of the Fifth Amendment to the United States Constitution, absent a grant of immunity, prosecute a taxpayer for failure to file income tax returns under 26 U.S.C. §7203 when the return required contained an incriminatory question which placed a taxpayer in the trilemma of (a) answering the question falsely under penalty of perjury; (b) answering the question truthfully and confessing the commission of a crime—a claim of privilege on the return being equivalent thereto—under the same §7203; (c) or failing to file and subjecting himself to prosecution under 26 U.S.C. §7203.

2. Whether the denial of a defense of fear of self-incrimination in a prosecution of a taxpayer by the federal government for failure to file income tax returns under 26 U.S.C. §7203 in negation of the element of wilfulness required by said statute is consistent with due process of law required by the Fifth Amendment to the United States Constitution.

3. Whether a sentencing process following conviction of a taxpayer for failure to file income tax returns under 26 U.S.C. §7203 where the court considers improper factors and evaluates the available information erroneously is consistent with procedural due process of law required by the Fifth Amendment to the United States Constitution.

Constitutional Provision Involved

Amendment V, United States Constitution: "no person . . . shall be compelled in any criminal case to be a witness against himself; nor be deprived of . . ., liberty, . . ., without due process of law; . . ."

Statement of the Case

Petitioner did not file federal income tax returns for the years 1960-67 inclusive, although required to do so.

Petitioner is charged under 26 U.S.C. §7203 with unlawfully, knowingly and wilfully failing to file federal income tax returns for the years 1964-1967. Shortly before trial the petitioner moved for acquittal on the ground that to have filed the 1964 return would have required him to reveal in answer to a question on the return—"Enter the name and address used on your return for 1963 (If the same as above, write 'same.' If none filed give reason . . ." —that he had unlawfully failed to file a return in 1963, which would have led to the discovery that he had not filed in 1960-1962 also, although required to file for each of those years. The same contention applied to the returns for 1965-1967. The motion was denied by the trial court. The motion was timely and was timely renewed during the trial, denied and excepted to.

Petitioner raised the defense of fear of self-incrimination as negating wilfulness, the only disputed element of the defenses charged, during the trial by means of a request to charge. The trial court refused to so charge and charged the jury that it could not consider fear of self-incrimination and criminal prosecution on the question of wilfulness. Although the trial court found that "there is no question [he believed that the question] would incriminate him" and that "in answering the question about the prior year would incriminate him . . . threaten him with criminal prosecution."

The jury found the petitioner guilty on all four counts set forth in the information and the trial court sentenced the petitioner to three months jail imprisonment on each count, to run concurrently, and to a fine of $3,000 on count number 1.

Petitioner appealed to the Circuit Court of Appeals for the Second Circuit on three points:

1. That the trial court erred in denying him the defense of self-incrimination;

2. That the trial court erred in denying the defense of fear of self-incrimination on the disputed element of "wilfulness" in the offenses charged; and

3. That the trial court erred in refusing probation and imposing a jail sentence by evaluating the available criteria to describe the offenses as "acquisitive" ones and in considering the raising of the defense of self-incrimination to petitioner's disadvantage, although timely raised.

The Circuit Court of Appeals in a *per curiam* opinion dated April 20, 1972 by Chief Judge Henry J. Friendly and Circuit Judges J. Joseph Smith and James L. Oakes affirmed the convictions below. A timely motion for re-argument was denied by order dated June 5, 1972.

In the petition for re-argument to the Circuit Court petitioner again raised the questions presented here but without opinion the Circuit Court by order dated June 5, 1972 denied re-argument.

The Circuit Court of Appeals expressly decided the constitutional issues raised. It denied the defense of self-incrimination, asserting that the question was not incriminatory and were it incriminatory the privilege must be asserted on the return itself.

It denied the defense of fear of criminal prosecution bearing on the element of wilfulness on the authority of *United States* v. *Fullerton*, 189 F. Supp. 211 (D. Md. 1960).

It denied the defense of procedural due process in sentencing by characterizing the improper factors as proper and by construing the erroneous evaluation of the available information as an accurate evaluation.

POINT I

Denial of the defense of self-incrimination based on the inclusion of an incriminatory question on a federal income tax return creating the trilemma of prosecution for failure to file, perjury, or self-incrimination, absent a grant of immunity, in a prosecution for failure to file, violates the petitioner's rights under the self-incrimination clause of the Fifth Amendment. This presents a substantial federal question not heretofore determined by this Court.

Petitioner is not unmindful of the oft quoted case of *United States* v. *Sullivan*, 274 U.S. 259 (1927), where the court held that the taxpayer was required to claim his privilege with respect to a neutral question except as to him, on the return, nor of *California* v. *Byers*, 402 U.S. 424, 434 (1971), where the court stated "There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement." However, in filing an income tax return where the taxpayer is required not only to state whether he filed for the prior year but to give the reasons for so failing to file and to do so truthfully under penalty of perjury, there is more than the possibility of legal involvement. Nor can the privilege be claimed in answer to the two questions without providing a direct link in a very short chain to criminal prosecution since the evidence of non-filing for the prior year exists within the Internal Revenue Service itself, i.e., no record of a filed return.

The petitioner is also not unaware that a tax return is directed at the public at large and not at an inherently

suspect group as in *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968); and *Haynes* v. *United States,* 390 U.S. 85 (1968), but the question inserted on the income tax return here is not aimed at the public at large quite so clearly; non-filers are not the public at large and except for those with not more than $600 of gross income in the prior year—the Nevada gamblers exception in *Marchetti, supra*—are aimed at a wide range of suspects.

The question here transcends the insertion of the offending question on a tax return. This court has recognized that society has and increasingly will become more populous, urban, industrialized and complex and that government regulation of human affairs has and will correspondingly become more detailed and pervasive. Accordingly, government's need to know has and will continue to become greater. In a free society this necessitates compelled reporting by the citizenry at large. This court in *California* v. *Byers,* 91 S. Ct. 1535, 1537 (1971) recognized that the tension between the State's increasing demand for disclosure and the protection of the right against self-incrimination gives rise to serious questions. And it recognized that the question must be resolved in terms of balancing the public need on the one hand against the privilege against self-incrimination on the other hand.

In *Byers, supra,* this court found that the public need was paramount and that the required disclosures were not incriminatory. In the problem posed in the filing or reporting cases the public need as to those who would be incriminated is not paramount and were it so as to a select group it could be easily remedied by a grant of immunity. Thus in the tax cases, such a grant would eliminate the

application of the privilege against self-incrimination, require the filing and enable the federal government within a year of the failure to file and pay tax, to require the taxpayer to report his delinquent tax and to assess the appropriate penalty and interest and to compel payment.

Therefore this issue, namely, the insertion at an incriminatory question on a return or report otherwise neutral on its face and otherwise aimed at the public at large and on which the constitutional privilege against self-incrimination cannot be asserted, raises an important constitutional issue which has not been decided by this Court.

POINT II

The denial of the defense of fear of criminal prosecution as negating the element of wilfulness in a prosecution under 26 USC, Section 7203, for failure to file income tax returns is in violation of the due process clause of the Fifth Amendment. This presents a substantial federal question not heretofore determined by this Court.

The determination of the meaning of the element of wilfulness required in a prosecution under 26 U.S.C. §7203 for failures to file income tax return has been the source of much and varied judicial interpretation, *United States* v. *Platt,* 435 F.2d 789, 795 (2d Circuit 1970); 22 A.L.R.3d 1173. Petitioner believes this variance in judicial interpretation between the various Circuit courts should be resolved by this court in order to insure due process under the Fifth Amendment.

POINT III

A sentencing process which considers improper factors and evaluates available information erroneously conflicts with the due process clause of the Fifth Amendment. This presents a substantial federal question not heretofore considered by this Court.

Petitioner recognizes the general rule of non-reviewability of sentences within the statutory limit. *Gore* v. *United States,* 357 U.S. 386, 393 (1958); *Blockburger* v. *United States,* 284 U.S. 299, 305 (1932). And petitioner recognizes that a trial judge may consider a wide range of data and factors in arriving at that decision. *United States* v. *Sweig,* 454 F.2d 181, 183-84 (2d Circuit 1972). However, petitioner contends that procedural due process under the Fifth Amendment is denied when a defendant in a criminal case is penalized for failure to enter a plea of guilty, in whatever terms consideration of this factor is couched, when a defendant is penalized for raising the defense of self-incrimination under the Fifth Amendment, although timely raised, and when the available criteria are clearly evaluated erroneously and contrary to the trial court's own findings. *Scott* v. *United States,* 419 F.2d 264 (C.A.D.C. 1969); *United States* v. *Mitchell,* 392 F.2d 214, 217 (2d Circuit 1968).

Petitioner contends that these exceptions to the general rule violate the procedural due process clause, and may well violate the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Petitioner believes that this Court should consider this substantial and fundamental federal constitutional question.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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Phone: (914) 949-2244

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 665—September Term, 1971.

(Argued April 13, 1972 Decided April 20, 1972.)

Docket No. 72-1102

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM A. EGAN, JR.,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
SMITH and OAKES, *Circuit Judges.*

Appeal from a judgment of conviction after a jury trial entered in the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* for failure to file federal income tax returns for the calendar years 1964 through 1967, in violation of 26 U.S.C. §7203.

Affirmed.

WILLIAM A. EGAN, JR., White Plains, New York, *Appellant Pro Se.*

RUDOLPH W. GIULIANI, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Peter F. Rient, Assistant United States Attorney, of counsel), *for Appellee.*

PER CURIAM:

We affirm this appeal from a conviction for willful failure to file federal income tax returns for the calendar years 1964 through 1967, in violation of 26 U.S.C. §7203. The principal contention is that, because the income tax returns for those years contained the usual question[1] to be answered by the taxpayer whether returns were filed for prior years, and because taxpayer had not filed returns for the years 1960-63 inclusive, he was put in what has been called the "cruel trilemma": if he filed the return and answered the question truthfully he would have been confessing to a crime; if he answered the question untruthfully he would have been subjecting himself to a perjury charge; if he failed to file the return he would have been committing a crime. *Cf. Marchetti* v. *United States,* 390 U.S. 39 (1968); *Malloy* v. *Hogan,* 378 U.S. 1, 11-12 (1964). *See also United States* v. *Sullivan,* 274 U.S. 259 (1927); Friendly, *The Fifth Amendment Tomorrow: The Case for*

[1] Enter the name and address used on your return for [last year] (if the same as above, write "same"). If none filed, give reason. The return forms for 1965 through 1967 included the additional phrase: "If changing from separate to joint or joint to separate returns enter [last year's] names and addresses."

Constitutional Change, 37 U. Cin. L. Rev. 671, 719-20 (1968). But there might have been any number of reasons not to file returns for the years 1960-63, some of which appellant stated to the Internal Revenue Service—*e.g.,* he had lost money in those years. Answering the question on the return in the negative with an explanation of this nature, if true, would of course not have resulted in criminal charges. But even considering that question were incriminating, since the government has a substantial interest in its tax revenues, appellant's privilege would relate only to his refusal to respond to the question, not to a total failure to file the return. The fifth amendment protects against giving testimony against oneself, not against bringing attention to oneself. *Cf. California* v. *Byers,* 402 U.S. 424, 434 (1971) ("There is no constitutional right to refuse to file an income tax return . . . in order to avoid the possibility of legal involvement").

The court's charge on willfulness was essentially correct. Appellant made a request to charge that, if the jury found that appellant did not file his returns for the years in question for fear of incriminating himself for previous violations, the jury must acquit. But this is no defense, *United States* v. *Fullerton,* 189 F. Supp. 211 (D. Md. 1960), and the court gave the appellant all that, perhaps even more than, he was entitled to by saying that the jury should acquit if it found that appellant believed he had a constitutional right not to file tax returns.

Appellant's remaining argument concerns certain considerations stated by the court while rendering an otherwise perfectly proper sentence. "A trial judge has very broad discretion in imposing any sentence within the statutory limits . . .," *United States* v. *Sweig,* 454 F.2d 181,

183 (2d Cir. 1972), and in the exercise of that discretion he may consider a wide range of data. *See id.* at 183-84 and cases there cited. The characterization of the crime of failing to file income tax returns as "acquisitive" may not have been totally accurate when, apparently, relatively small amounts of dollars were involved. But it is descriptive of the general type of crime as opposed to one of violence, drugs or the like, and the judge was expressing a perfectly proper philosophy of sentencing to the effect that this kind of crime—sometimes called "white collar" or "commercial"—should be treated just as seriously as some of the so-called "ghetto" crimes. Taking note of the defense of self-incrimination as having "come up very late in the game" was supported factually in the record and did not refer to trial tactics, but to appellant's previous explanations for his failure to file.

Judgment affirmed.

APPENDIX B

Judgment of the U.S. District Court

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 71 Cr 55

UNITED STATES OF AMERICA,

—v.—

WILLIAM A. EGAN, JR.

On this 28th day of December, 1971 came the attorney for the government and the defendant appeared in person and by Louis Bender, Esq., of counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly failing to make income tax returns for the calendar years 1964, 1965, 1966 and 1967 to the District Director of Internal Revenue for the Manhattan District, or to any other proper officer of the United States, within the required time. (Title 26, United States Code, Section 7203) as charged in counts 1, 2, 3 and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Months on each of counts 1, 2, 3 and 4 to run concurrently with each other. Defendant is Fined $3,000.00 on count 1.

Execution of sentence is stayed pending appeal. Defendant is continued released on his own recognizance.

A TRUE COPY

JOHN LIVINGSTON
Clerk

By I. WEINBERG
Deputy Clerk

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

MARVIN E. FRANKEL
United States District Judge

JOHN LIVINGSTON
John Livingston
Clerk

Judgment of the U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of April, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge.

HON. J. JOSEPH SMITH,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

WILLIAM A. EGAN, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM A. EGAN, JR.,

Defendant-Appellant.

A petition for a rehearing having been filed herein by appellant pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

June 5, 1972

HENRY J. FRIENDLY
Chief Judge

J. JOSEPH SMITH
JAMES L. OAKES
Circuit Judges

Order Staying Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of June, one thousand nine hundred and seventy-two

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM A. EGAN, JR.,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated June 8, 1972, to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

HENRY J. FRIENDLY
Chief Judge

J. JOSEPH SMITH
JAMES L. OAKES
Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–30

WILLIAM A. EGAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on four counts of having willfully failed to file income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to concurrent prison terms of three months on each count and fined $3,000.

The proof showed that petitioner, an attorney, had filed no federal income tax returns for the calendar years 1960 through 1967 until September 1968, after the Internal Revenue Service advised him that it was beginning an investigation of his delinquencies. It was stipulated that petitioner had sufficient income in each of the four prosecution years (1964–1967) to make

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him liable to the filing requirement (Tr. 50; Govt. Exs. 14, 15, 16).[1] Petitioner admitted on the witness stand that he had not filed the returns and that he had known that he was required to file (Tr. 67–68). He claimed that his reason for failing to do so during the prosecution years was that the returns contained a question asking whether he had filed in prior years, and that to have answered that question truthfully would have brought to light his previous failures to file, thus resulting in self-incrimination.

Petitioner had stated to Internal Revenue Service agents during their investigation that he had not been required to file returns from 1960 through 1963 because he had lost money during those years (Tr. 137); this statement, of course, was inconsistent with petitioner's self-incrimination defense with regard to failure to file for calendar year 1964. In the course of the investigation petitioner also advanced various explanations for his failure to file during the prosecution years, but he did not at that time assert a fear of self-incrimination (Tr. 143–144). The jury was instructed that it should acquit petitioner if it found that he believed he had a constitutional right not to file the returns (Tr. 283–284). The court of appeals affirmed petitioner's conviction *per curiam*.

1. Petitioner contends (Pet. 6–8) that he had an absolute right not to file tax returns because of the question in those returns asking whether he had filed for the previous year; that to have answered truthfully would have incriminated him by bringing to light

[1] "Tr." references are to the court reporter's transcript of testimony and proceedings in the district court.

his earlier delinquency; that to have answered falsely could have resulted in a perjury conviction; and, therefore, that he could not properly be required to file at all. But this argument is fully answered by *United States* v. *Sullivan,* 274 U.S. 259, where the defendant, charged with willful failure to file an income tax return, argued that in filing he would have incriminated himself. The Court unanimously rejected this argument, stating (*id.* at 263): "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." See, also, *California* v. *Byers,* 402 U.S. 424, 434.

2. Equally without substance is the argument (Pet. 8) that petitioner was deprived of due process by the district court's refusal to instruct the jury that petitioner's alleged fear of self-incrimination would itself negate the element of willfulness. In fact, the district court did charge the jury that it should acquit petitioner if it found that he believed he had a constitutional right not to file the returns (Tr. 283–284). This charge was, if anything, too lenient, for petitioner's fear of incrimination related only to the single question concerning prior returns and not to the entire return. See *United States* v. *Sullivan, supra.* In any event, the charge was not prejudicial to petitioner for the mere assertion of fear of incrimination does not, in the absence of a good faith belief in the existence of a constitutional right to withhold information, negate the element of willfulness. See *United States* v. *Murdock,* 290 U.S. 389. The evidence on

whether petitioner had such a good faith belief was conflicting, and the jury chose not to accept petitioner's testimony.

3. Finally, the record does not support the argument (Pet. 9) that the district court penalized petitioner for his reliance on the defense of self-incrimination or otherwise used improper criteria in imposing sentence. The district court's comment that the self-incrimination defense had "come up very late in the game" did not, as the court of appeals noted (Pet. App. 14), reflect antagonism toward the defense but simply referred to petitioner's previous contradictory explanations as to why he had not filed tax returns for the prosecution years. Since no improper sentencing standards were used and the sentences were within the limits prescribed by law, petitioner's sentences were correctly upheld by the court of appeals. *Gore* v. *United States*, 357 U.S. 386, 393.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys.

AUGUST 1972.

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—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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September, 1972.

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Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on four counts of having wilfully failed to file income tax returns, in violation of 26 U.S.C. Section 7203. He was sentenced to concurrent prison terms of three months on each count and fined $3,000.

Petitioner appealed to the United States Court of Appeals for the Second Circuit which affirmed (459 F.2d 997). Taxpayer petitioned this Court for a Writ of Certiorari. The United States filed a memorandum in opposition.

The United States, in its memoranda in opposition to the petition herein on page 1 thereof, states that: "it was stipulated that petitioner had sufficient income in each of the four prosecution years (1964-1967)" to make him liable to the filing requirements (Tr. 50; Government Exs. 14, 15,

16). The stipulation actually established that petitioner had income in excess of $600 for the years 1960 through 1967, did not file federal income tax returns for those years, and did file for extensions of time in which to file on three different occasions during those eight years (Tr. 50; Government's Exs. 14, 15, 16).

The government, on page 2 of its memoranda, states that petitioner claimed to "Internal Revenue Service agents during their investigation that he had not been required to file returns from 1960 through 1963 because he had lost money during those years (Tr. 137)." This account was contradicted by petitioner in his testimony (Tr. 105, 106, 109), but more importantly, it was contradicted by the Government's Exhibits, 14, 15 and 16, which were stipulated into evidence (Tr. 50) and consisted of applications by petitioner for extensions of time to file his 1960, 1961 and 1964 federal income tax returns (Tr. 69, 70), hardly proof that petitioner felt he lost money and did not have to file income tax returns.

The government then proceeds to claim that petitioner never asserted a fear of self-incrimination during the course of the investigation. Again, there was a variance between the testimony of the government's witness, Special Agent Murphy, and petitioner, but the Special Agent did testify that the fear of self-incrimination had come up at the very first conference with respect to a question on the application for an extension of time to file, which required the applicant to state whether he had filed federal income tax returns for the preceding three years, rather than with respect to the question on the return itself inquiring about the preceding year (Tr. 143-144).

The foregoing is presented to clarify what the transcript of the trial actually revealed. However, if it is the assertion of the government that any statement by petitioner to investigating agents constituted a waiver of the privilege, "it has been uniformly held that a prior disclosure to investigating officials cannot constitute a waiver of the privilege with respect to the same matter in a subsequent legal proceeding. A waiver of the privilege must occur in the same proceeding in which it is sought to be invoked." *United States* v. *Goodman,* 289 F.2d 256, 259 (Cir. 4th—1961), and the cases cited thereunder. And here it was invoked by motion before trial and by timely motions during the trial. As this Court stated in *Marchetti* v. *United States,* 390 U.S. 39, 51, "Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after trial to be unconstitutional; no more can be required."

1. The government's contention in its paragraph numbered "1" seems to be that *United States* v. *Sullivan,* 274 U.S. 259, and *California* v. *Byers,* 402 U.S. 424, 434, stand for the proposition that even though in this case to claim the privilege in response to the offending questions on the returns in the context in which they were placed would have directly and inexorably subjected petitioner to the substantial risk of criminal prosecution, he was required to do precisely that. But as this Court stated in *Marchetti, supra,* at page 50, "to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.'"

It is submitted that neither *Sullivan, supra,* nor *Byers, supra,* stand for this proposition.

Mr. Justice Brennan, in his concurring opinion in *Marchetti* v. *United States,* 390 U.S. 39, 72 (1968), signified his understanding of the limitations of the *Sullivan* case, *supra,* when he stated "*United States* v. *Sullivan,* supra, make clear that an individual is not exempted by the fact that he may be privileged to refuse to answer some questions, from a requirement, 'directed at the public at large,' of filing an income taxe return *exclusively* containing questions 'neutral on their face.'" (Italics supplied.) The requirement that the return contain *exclusively* questions neutral on their face takes this case out of the *Sullivan* ambit. Requiring the petitioner to state whether or not he had filed an income tax return for the prior year and, if not, the reasons, cannot be considered a neutral question in the context in which it was placed.

Furthermore, this Court in *California* v. *Byers,* 91 S. Ct. 1535, 1545 (1971) limited the scope of *Sullivan, supra,* as well as its finding in *Byers, supra,* when it stated "there is no constitutional right to refuse to file an income tax return or flee the scene of an accident in order to avoid the possibility of legal involvement." Here, answering the questions on the return truthfully or claiming the privilege with respect to the questions, in either case, resulted, not in the "possibility of legal involvement" but directly in, at the very least, a very substantial risk of criminal prosecution of the crimes charged here (Pet. 6).

The *Sullivan* question, "where did you get your money?" or, even, "did you get your money illegally?", can be answered by claiming the privilege because an admission that it applies does not connect the claimant to a specific crime. Nor does it give either a lead or a link to indictment. But, to the question, "do you have possession of a gun? If 'yes,' give the name and serial #," the privilege cannot be

claimed with respect to one having illegal possession of gun without giving the police a lead. The test of content helps administer the test of intent: its measure for allowing a delayed claim is specificity of criminal content. Here, in answer to the question regarding the filing of a return for the preceding year would necessitate a truthful "No" answer, followed by the reasons that petitioner had not filed for the preceding year. The only reason that could truthfully be given to escape a substantial risk of criminal prosecution would be that the taxpayer did not have more than $600 of gross income in the prior year. In this combination form the two questions here really posed the query, "did you illegally fail to file a federal income tax return last year?".

Perhaps an extreme example will illustrate the central issue. Assume a compelled truthful census return contained among its numerous queries "did you kill anyone since the last census through the instrumentality of a motor vehicle or a gun? If 'yes,' give the name and address of the person, the circumstances, indicating date, time and place, and the registration and serial number of the motor vehicle or gun involved." The return is directed at the public at large not at an inherently suspect group. The government's need to know is unquestionable. The question can be answered by all but a few with a "No" answer. A few could answer "yes" and explain the killing by a motor vehicle accident in which they were exonerated or self-defense with a gun in which they were exonerated, and the like, but some could not answer without subjecting themselves to the substantial risk of criminal prosecution, or, for them to claim the privilege in response to the questions, would certainly point the finger and give the government a "lead."

Although the foregoing is an extreme example of the insertion of an incriminatory question, it requires little imagination to visualize the needs of various federal agencies for information and the possibilities of compelled self-incrimination.

Therefore, here, unlike *Sullivan, supra,* the privilege cannot be claimed with respect to the offending questions on the return, and, unlike *Byers, supra,* here there is not merely the possibility of legal involvement but direct, immediate confession of failure to file followed by the reasons, only one of which—earnings of not more than $600 in the prior year—could eliminate a substantial risk of criminal prosecution. Mistake, inadvertence, gross negligence and the life are all questions of fact to be decided on a trial and would not eliminate the substantial risk of criminal prosecution.

The issue has never been decided by this Court and because of its application to the government's increasing need for self-reporting by the citizenry, it should be.

2. The government's citation of *United States* v. *Sullivan,* 274 U.S. 259 with respect to petitioner's second point is inapposite. If petitioner did not have the legal right to claim the privilege as to filing the return then he was legally required to incriminate himself, to risk criminal prosecution and loss of liberty. This being so petitioner contends that the failure to file was under duress and not willful. This defense was alluded to in *United States* v. *Knox,* 396 U.S. 77, 83 (1969) when the late Mr. Justice Harlan stated: "the question whether *Knox's* predicament contains the seeds of a 'duress' defense, or perhaps whether his false statement was not made 'willfully' as required by #1001, is one that must be determined initially at his trial."

To require here, the pre-Marchetti period, as the Trial Judge did, the belief in a legal right in addition to the fear of self-incrimination, as the element negating willfulness, was to require not only a frightened exceptional constitutional lawyer, but one with clairvoyance. Petitioner contends that all that was required to be found by the jury was the real rather than the imaginary fear of self-incrimination, criminal prosecution and loss of liberty.

Here the trial court found the petitioner failed to file because of fear of self-incrimination, criminal prosecution and loss of liberty (Tr. 212, 283). Surely the justifiable excuse in *United States* v. *Murdock,* 290 U.S. 389, 394 (1933), and consequently should have granted petitioner's motion for acquittal (Tr. 200) since there was no question for the jury. Even the self-incrimination clause of the Fifth Amendment itself is a recognition that it is duress to force a citizen to incriminate himself.

3. The government contends that there were no improper sentencing standards used and that consequently the general non-reviewability as enunciated by this Court in *Gore* v. *United States,* 357 U.S. 386, 393, is applicable. By implication it admits that improper sentencing standards warrant review.

However, the trial court based its sentence exclusively on its recited factors (Tr. 304, 305, 307) and then proceeded to enumerate the factors upon which it based its decision: (a) petitioner's good luck and advantages (Tr. 305), (b) the calculated kind of acquisitive crime (Tr. 305), (c) failure to plead guilty (Tr. 307), equation of crimes *mala in se* with crimes *mala prohibita* (Tr. 308), disbelief of the defense of self-incrimination (Tr. 309), the time of raising the defense of self-incrimination (Tr. 309), and the fact

that the Court had made a defense available to petitioner that it doubted ought to have been made available (Tr. 309-310).

The record disclosed that petitioner had taxable income averaging less than $3700.00 for seven of the eight years in which he failed to file (Govt. Exs. 6-13), and that he had literally practiced from his home for a short period (Tr. 65-66), certainly not good luck and advantage. The Trial Court itself found that the reason for non-filing was fear of criminal prosecution, again not an acquisitive crime of calculated type (Tr. 212, 283). Furthermore, if petitioner was to be penalized for raising the defense of self-incrimination he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights. (*Thomas* v. *United States,* 368 F.2d 941 (5th Cir. 1966), for going to trial at all and because the trial judge did not believe his testimony, all condemned as violations of procedural due process in *Scott* v. *United States,* 419 F.2d 264 (CADC 1969).)

Therefore, petitioner contends that procedural due process in the sentencing process has been violated and that this Court has the power to review it. *Townsend* v. *Burke,* 334 U.S. 736 (1948); 8 Moore's Federal Practice, Cipes—Criminal Rules, Section 32.09, pp. (32-118)-(32-129).

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner Pro Se

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